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NO. 82-618

In The

Supreme Court of the United States

October Term, 1982

JOSEPH A. KOSAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provision of the Federal Tort Claims Act (FTCA) that bars claims "arising in respect of. . .the detention of any goods or merchandise by any officer of customs. . .," 28 U.S.C. §2680(c), precludes a claim against the United States for negligent and careless damage to property while in the custody of the Customs Service.

2. Whether the district court judge erred in dismissing the Petitioner's Complaint.

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Gottlieb, The Federal Tort Claims Act - A Statutory Interpretation, 35 Geo.J.L. 1 (1946) 12,13

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OPINIONS BELOW

The opinion of the court of appeals is reported at 679F.2d 306 (1982). (Pet. App.A, 1a-11a.) There is no opinion by the district court. (Dist. Ct. Order, Pet. App.D, 14a.)

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1982. A Petition for Rehearing was denied on June 24, 1982. The Petition For Writ Of Certiorari was filed with this Court on September 21, 1982. On January 10, 1983, Certiorari was granted on this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act, Act of June 25, 1948, 62 Stat. 982 (28 U.S.C. §§1346(b), 2671 et seq.)

28 U.S.C. §1346(b) -

> **The district courts...shall have exclusive jurisdiction of civil**

> actions on claims against the United States, for money damages, ..., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680(c) -

> The provisions of this chapter (Tort Claims Procedure) and section 1346(b) of this title shall not apply to --... .
> (c) Any claim arising in respect of...the detention of any goods or merchandise by any officer of customs....

STATEMENT OF THE CASE

On February 28, 1978, the Customs Service Agents acting with a search warrant, (J.A."B"11), seized certain antiques, objects of art, and personal papers from the home of Petitioner. Petitioner was subsequently charged with smuggling goods into the United States in violation of 18 U.S.C. §545, but was found not guilty on May 8, 1978

by a jury. (Petitioner was in the navy stationed in Guam. He was transferred to the Philadelphia Naval Base and shipped home his oriental art collection. He was accused of falsifying a customs statement by listing his art collection as his own personal property rather than listing it for resale in the United States.)

On September 29, 1978, the Customs Service forwarded a "Notice of Penalty" to the Petitioner informing him that his art collection was being forfeited. After Petitioner filed a Petition to have his collection returned, the Customs Service returned the artifacts on June 1, 1979 in damaged condition.

After the Customs Service rejected Petitioner's claim for damages, suit was filed against the United States in District Court seeking $12,310.00 in damages. (J.A."A"1-10). The Respondent filed a Motion to Dismiss the Complaint which was granted by the District Court. The United

States Court of Appeals for the Third Circuit affirmed in a three judge panel decision with one dissent.

SUMMARY OF ARGUMENT

The legislative history of the exemptions under section 2680 were made because as a matter of public policy the Government should be exempt from certain types of law suits or there are other adequate remedies available. These reasons do not apply to the exemption for the customs service under section 2680(c).

The exemption under section 2680(c) applies only for damage caused by the detention itself and not for the negligent or careless destruction of property while it is in the possession of the customs service.

Congress specifically exempted the postal service for negligence and never intended to exempt the customs service.

The District Court should not have dismissed the complaint because the Petitioner can prove damages for two items which were not detained.

ARGUMENT

I. THE FEDERAL TORT CLAIMS ACT DOES NOT BAR AN ACTION FOR DAMAGE TO DETAINED PROPERTY CAUSED BY NEGLIGENCE.

A. THE LEGISLATIVE HISTORY OF §2680(c) DOES NOT BAR A CLAIM FOR DAMAGE CAUSED BY THE NEGLIGENCE OF THE CUSTOMS SERVICE.

The loss suffered by the Petitioner through the damage to his property was of the type that Congress intended the government to recompense. Petitioner should be compensated by suit brought through the Federal Torts Claims Act, 28 U.S.C. §§2671 et seq. This act abolished sovereign immunity when citizens incurred injury or damage because of the negligence of government employees.

The issue then becomes whether 28 U.S.C. §2680(c) bars the Petitioner from bringing his action for negligence. When Congress passed the exemptions specified in 28 U.S.C. §2680, it did so because they were "claims which relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies

are already available". S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946). This legislative history is also cited in Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460 (1980) and Kosak v. United States, 679 F.2d 306 (3rd Cir. 1982).

This Court pointed out in Hatzlachh, Supra. that the intended effect of the exemptions to §2680 were included "because they related to activities for which, as a policy matter, the Government should be free from tort claims...or because other laws provided the machinery for recovery on these claims", 444 U.S. 460, 463 n.4, 100 S.Ct. 647, 649 n.4 (1980) citing from Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 - 39 (1940). In this footnote cited by this Court, Judge Alexander Holtzoff, who was testifying, made a distinction between exemptions for the postal service which should be exempted as a policy matter and claims against the customs

service which should be exempted because other laws provide a remedy. The entire footnote is listed verbatim as follows:

> When Congress first considered the exception in 1940, Judge Alexander Holtzoff, then a Special Assistant to the Attorney General, testified before the Senate Judiciary Subcommittee considering the bill. As the then Mr. Holtzoff described the intended effect of the various exemptions, certain of them, such as the loss or miscarriage of postal matter and certain intentional torts, were included because they related to activities for which, as a policy matter, the Government should be free from tort claims. Other exemptions, such as the assessment or collection of taxes or customs duties, the detention of goods by customs officers, and admiralty or maritime torts, were included because various other laws provided the machinery for recovery on these claims and "[t]here was no purpose in interfering with that machinery." Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 - 39 (1940). The purpose was to avoid duplication; there was no indication that existing remedies, if any, were withdrawn. 444 U.S. 460, 463 n.4.

Thus, Congress felt that public policy does not mandate an exemption for the customs service and Congress never intended that the Government be free from tort claims for this

reason.

In fact, as a policy matter, the Government should be subject to tort claims for their actions in this case.

In the case at bar, the customs agents acted in a reprehensible manner. They posed as merchants from Abraham Weiner & Sons of Camden, New Jersey and tried to talk the Petitioner into selling his art collection (which Petitioner never did). They forced their way into Petitioner's home (with a search warrant which for purposes of this argument Petitioner concedes was valid) and seized his property and personal papers, the latter of which were never returned. When the Government lost the criminal case, they still would not return the property and pursued a forfeiture proceeding which they abandoned. When they finally returned Petitioner's art collection, some of the items were returned in a paper bag broken, cracked and damaged. There was great animosity between the customs agents and the

Petitioner throughout the case. If Petitioner has no recourse for the damages he sustained, then there is nothing to prevent the Customs Service from smashing or destroying any items it seizes as evidence before returning it to its rightful owner.

Secondly, this Court is faced with the meaning of the words "adequate remedies are already available" as used by Mr. Holtzoff. In enacting subsection (c), Congress had wanted to avoid providing a federal remedy that would duplicate already existing procedures for challenging unlawful detentions or excessive duties imposed. Thus, subsection (c) deliberately contains no exemptions from liability for loss or damage to goods while they are being detained by customs. The purpose of the subsection was not to exempt the Customs Service of all liability. It was to avoid interfering with the existing remedial machinery for challenging the detention of goods or the assessment of duties.

Apparently as a result of Mr. Holtzoff's testimony in 1940, the conclusion that some of the exemptions now included in Section 2680 represented instances where "adequate remedies are already available" was repeated in legislative reports and hearings in succeeding years. See Hearings on Tort Claims (H.R. 5373 and H.R. 6463) before the House Committee on the Judiciary, 77th Cong., 2d Sess. 28, 44 (1942); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942). This consistent pattern demonstrates that the successive Congresses which considered the Federal Tort Claims Act provisions in the several years prior to its passage viewed subsection (c) as granting no real exemption. It was rather, designed to prevent owners of detained goods from pursuing an overlapping or additional remedy.

The statutory remedies which Congress wished to leave undisturbed permitted challenges to (1) the propriety of a detention and (2) the duty assessed. 19 U.S.C.

§§1602-1614 (1946); 19 U.S.C. §§1514-1519 (1946); 28 U.S.C. §§296-297 (1946); 28 U.S.C. §§2674 (1940). There were, on the other hand, no particular statutory procedures for the recovery of damages for loss or damage to goods while in the custody of Customs officers. The exception now contained in Section 2680(c) was limited, therefore, to suits challenging the imposition of duties or a decision to detain goods. It was not a blanket exemption for all activities of Customs officers, and it was surely not an exemption from liability for the loss of goods held in the custody of the Customs Service.

This interpretation of the legislative history of subsection (c) is corroborated by the unanimous view of several law review articles of which this Court is already aware and cited in Hatzlachh, supra.: See 2L. Jayson, Personal Injury Handling Federal Tort Claims §256 (1979); Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum.L.Rev. 722, 729-730 (1947); Gottlieb,

The Federal Tort Claims Act--A Statutory Interpretation, 35 Geo.Law J. 1, 45 (1946); Comment, The Federal Tort Claims Act, 42 Ill.L.Rev. 344, 360 (1947); Note, The Federal Tort Claims Act, 56 Yale L.J. 534, 547-548 (1947).

Thus, Congress never intended to shield the Government from liability in this case.

B. THE LANGUAGE USED BY CONGRESS IN ENACTING SECTION 2680(c) DOES NOT BAR THE PETITIONER FROM BRINGING SUIT FOR DAMAGE.

In the instant case, it was not the detention of these collectibles, but their careless and destructive mishandling by customs officials or the United States Attorney's office which caused the breakage and loss. The ninth circuit in A-Mark, Inc. v. United States Secret Service, 593 F.2d 849 (9th Cir. 1978) and Alliance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958) reasoned that the exemption of §2680 (c) does not cover negligent handling of the goods but only bars damages for claims

caused by the detention itslef.

It is sensible to view §2680(c) as did the court in Alliance and A-Mark. The exception provides an umbrella protection so that customs officials may inspect goods carefully and slowly, free from claims that their prolonged or illegal detentions have caused losses to persons. The exception is not, however, a carte blanche to carelessness.

The Alliance court, supra., also pointed out one other important factor. §2680(b) expressly bars actions against the postal service for negligent transmission of postal matter. This court then went on to state:

> "If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. §2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others." 252F.2d 529, 534.

As was pointed out in the dissent in the case at bar, the Court should look at the logic and language of the exception. As was stated by Judge Weiss,

> "By its terms, it excludes any claim 'arising in respect of ... the detention of any goods... .' Webster's Third International New Dictionary 1934 (1968) defines 'in respect of: to mean 'as to: as regards: insofar as concerns: with respect to.' These definitions indicate that the statutory exception is directed to the fact of detention itself, and that alone. The language is not broad enough to exempt a claim for damage occurring 'during' detention." 679 F.2d 306, 310.

The Petitioner had the right to have his property returned to him in undamaged condition. He should be compensated by the United States for the damage that was done.

There is no justification to allow the Government to take property from its citizens without their consent and return it in damaged condition. It is unfair to make the Petitioner bear the loss in this situation. The Petitioner had every right to have his

property returned to him in the same condition in which it was seized. The threat of a damage suit will force the customs service to properly care for anothers property. Congress never meant to give the Customs Service a license to destroy property.

II. THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT.

The federal courts are uniform in their position that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 2L Ed. 2d 80, 78 S.Ct. 99, at 355 U.S. 45-46 (1957).

One of the items destroyed by Customs was broken while the search warrant was being executed. It was not one of the items detained by Customs and thus the exemption does not apply. Also, damages were alleged for failure to return a stereo receipt which

was seized with Petitioner's personal papers. The exemption states that it is only for damage to goods and merchandise and thus it doesn't apply to damages caused by failure to return the receipt. Thus, even if the exemption barred most of Petitioner's law suit, he still could prove a set of facts to recover for one of the items that was destroyed and for his damages in not getting back the receipt.

CONCLUSION

For the foregoing reaons, the judgment of the District Court and the Court of Appeals should be reversed and the matter remanded to the District Court.

Respectfully submitted,

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